# INDEX

## Subject Index


| | Page |
|---|---|
| Scope of Brief | 1 |
| Concerning Jurisdiction | 2 |
| The Precise Question Presented | 4 |
| Argument | 5 |
| Respondents-Appellees Have Not Faced Up to the Real Question | 5 |
| The Pipe Line Cases | 7 |
| Other Cases Sustaining Tax on Consummation of a Transaction Within a State | 11 |
| Discrimination in Reverse | 16 |
| Anticipated Summary Enforcement | 18 |
| The Question Merits Review | 19 |
| Conclusion | 21 |


## Table of Cases


| | |
|---|---|
| *Armstrong* v. *City of Tampa*, 118 So. 2d 195 (Fla. 1960) | 15 |
| *Berkshire Fine Spinning Associates, Inc.* v. *City of New York*, 5 N.Y.2d 347, 157 N.E.2d 614, appeal dismissed, 361 U.S. 3 (1959) | 15 |
| *Bradford Electric Light Co., Inc.* v. *Clapper*, 284 U.S. 221 (1931) | 3 |
| *City of Chicago* v. *Atchison, T. & S.F. Ry.*, 357 U.S. 77 (1958) | 2 |
| *City of Detroit* v. *Murray Corp.*, 355 U.S. 489 (1958) | 2 |
| *East Ohio Gas Co.* v. *Tax Comm'n*, 283 U.S. 465 (1931) | 6, 8 |
| *Field Enterprises, Inc.* v. *Washington*, 47 Wash. 2d 852, 289 P.2d 1010, aff'd, 352 U.S. 806 (1956) | 6, 12 |
| *Great Northern Ry. Co.* v. *Merchants Elevator Co.*, 259 U.S. 285, 290-291 | 20 |
| *International Harvester Co.* v. *Dep't of Treasury*, 322 U.S. 340 (1944) | 6, 12 |
| *Keystone Metal Co.* v. *City of Pittsburgh*, 374 Pa. 323, 97 A.2d 797, cert. denied, 346 U.S. 887 (1953) | 15 |

Page

*McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U.S. 33 (1940) 6, 12

*McGoldrick* v. *Felt & Tarrant Mfg. Co.*, 309 U.S. 70 (1940) 6

*Memphis Natural Gas Co.* v. *Beeler*, 315 U.S. 649 (1942) 7

*Memphis Natural Gas Co.* v. *Stone*, 335 U.S. 80 (1948) 6

*Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 347 U.S. 157 (1954) 6, 9

*Mississippi River Fuel Corp.* v. *Hoffman*, 4 Ill. 2d 468, 123 N.E.2d 503, cert. denied (Ill. 1954), 349 U.S. 935 (1955) 19

*New Marshall Engine Co.* v. *Marshall Engine Co.*, 223 U.S. 473 (1912) 20

*Norton Co.* v. *Dep't of Revenue*, 340 U.S. 534 (1951) 6, 12, 13

*Panhandle Eastern Pipe Line Co.* v. *Michigan Public Service Comm'n*, 341 U.S. 329 (1951) 10

*Panhandle Eastern Pipe Line Co.* v. *Public Service Comm'n*, 332 U.S. 507 (1947) 5, 11

*Pennsylvania Gas Co.* v. *Public Service Comm'n*, 252 U.S. 23 (1920) 10

*Pratt* v. *Paris Gaslight and Coke Co.*, 168 U.S. 255 (1897) 20

*Public Service Comm.* v. *Wycoff Co.*, 344 U.S. 237, 247 (1952) 19

*Southern Natural Gas Corp.* v. *Alabama*, 301 U.S. 148 (1937) 6, 7

*Spector Motor Service, Inc.* v. *O'Connor*, 340 U.S. 602 (1951) 6

*St. Louis S. W. R. Co.* v. *Arkansas*, 235 U.S. 351 19

*Standard Dredging Corp.* v. *Alabama*, 122 So. 2d 280 (Ala. 1960), appeal dismissed, 364 U.S. 300 (1960) 15

*State of Arkansas* v. *Kansas and Texas Coal Co.*, 183 U.S. 185 (1901) 20

*Sun Oil Co.* v. *Burford*, 130 F.2d 10 (C.A. 5, 1942), reversed on other grounds 319 U.S. 315, rehearing denied 320 U.S. 214 4

*Texas Gas Transmission Corp.* v. *Atkins*, 327 S.W.2d 305 (Tenn. 1959) 15, 19

Page

*United States* v. *Public Utilities Comm'n*, 345 U.S. 295 (1953) 10

*Utah Power and Light Co.* v. *Pfost*, 286 U.S. 165, 187 19

OTHER AUTHORITIES

Hartman, State Taxation of Interstate Commerce 199 (1953) 16

STATUTES

Code of Alabama, 1958, Title 37, Section 735 6

28 U.S.C. 1254 (1) and (2) 3

IN THE

# SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1960**

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**Nos. 721 and 778**

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UNITED GAS PIPE LINE COMPANY,
*Petitioner-Appellant,*

*v.*

IDEAL CEMENT COMPANY,

*and*

SCOTT PAPER COMPANY,
*Respondents-Appellees*

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No. 721, ON PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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No. 778, ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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## REPLY BRIEF OF PETITIONER-APPELLANT, UNITED GAS PIPE LINE COMPANY

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### Scope of Brief

The petitioner-appellant, United Gas Pipe Line Company, submits this as a combined brief in reply to the briefs of the respondents in opposition to certiorari

(case No. 721) and the motions of the same parties as appellees (case No. 778) to dismiss or affirm.

We would remind the Court that United is in the unique position of a taxpayer who is urging the validity of a tax levied on it. United occupies this position, first, because it here seeks contractual reimbursement from two of its customers for taxes already paid, and second, because it believes the tax is constitutional and is also equitable in that it falls alike on the interstate and intrastate sellers of natural gas to the ultimate consumer.

**Concerning Jurisdiction**

We have pursued the necessary procedural steps for a review either by certiorari or appeal. We urge that the importance of the question presented is such that the case should be considered on its merits. Whether this is done by certiorari or appeal is of no great moment.

Neither Ideal nor Scott questions jurisdiction to review by certiorari but both contend that an appeal will not lie. It is nevertheless felt that appeal is the more appropriate route.

In *City of Detroit* v. *Murray Corp.* 355 U.S. 489 (1958), the Court of Appeals held the city and county tax ordinances involved were inapplicable to the property of the plaintiffs because of governmental immunity under the federal constitution, without passing upon the "total unconstitutionality" or validity of the ordinances under attack. Appellants sought review both by certiorari and appeal and this Court held that appeal was proper under 28 USC 1254 (2).

In *City of Chicago* v. *Atchison, T. & S. F. Ry.*, 357 U.S. 77 (1958), the Court of Appeals held the city ordinance requiring a certificate of convenience and

necessity did not apply to the railroad terminal company because it was repugnant to the commerce clause of the federal constitution. The validity *vel non* of the ordinance itself was not involved, but only the validity of its application to a particular party. This Court was given the opportunity to review either by certiorari or appeal under 28 USC 1254 (1) and (2) and held that the case was properly before it on appeal and denied certiorari.

Respondent Scott in case No. 721 argues that the filing of a notice of appeal constituted an election of remedy and precluded "the filing of a petition for the writ of certiorari hard on the heels of the filing of the notice of appeal." Numerous cases, however, including the two just discussed, illustrate that in similar situations the party seeking review has been permitted to "knock on both doors" and this Court has at the appropriate time determined which was the proper one to open, the one labelled certiorari or the other labelled appeal.[1]

Respondent Ideal in case No. 721 filed a supplement contending that the petition for certiorari was not timely filed because the time that elapsed between the original opinion and the *second* petition for rehearing exceeded the 21 days allowed by Rule 19 of the Court of Appeals for petitions for rehearing generally. However, the second petition was filed only 15 days after the opinion on the first petition for rehearing and was directed to the errors and omissions of that opinion. The second petition could not possibly have been filed until the Court's action on the first petition was known.

Ideal overlooks the holding of the Fifth Circuit that

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[1] See *Bradford Electric Light Co., Inc.* v. *Clapper*, 284 U.S. 221 (1931), involving this very question of "election" under the predecessor statute.

while its rules do not contemplate a second petition for rehearing, it will for good cause allow one to be filed and consider it on the merits. In such a case this Court has allowed review on the merits. *Sun Oil Co. v. Burford*, 130 F2d 10 (CA 5, 1942), reversed on other grounds 319 U.S. 315, rehearing denied 320 U.S. 214. Our second petition for rehearing was in fact accepted and considered on its merits by the Court of Appeals. The Court thereupon modified its previous opinions so as to affirm in part the District Court judgments theretofore reversed in toto, holding for the first time that United was entitled to recover from the respondents the amounts reimbursed to United's agent, Mobile Gas Service Corporation, for taxes paid by the latter (which incidentally impeaches the view of the Court of Appeals that the tax is on the flow of commerce). The Court order of November 16, 1960, is itself headed "*On* Second Petition for Rehearing" which, of course, means that the petition was accepted and considered on its merits. Moreover, all doubt is dispelled by the order of the Court of Appeals of December 27, 1960, fixing the effective date of its judgment of reversal as November 16, 1960, the date of the denial of the second petition for rehearing.

**The Precise Question Presented**

The appellees-respondents have not come to grips with the specific question presented. They deal in generalities with the established principle that states and municipalities may not tax the flow or very process of interstate commerce. This we recognize as established law but it is not involved here. They also repeatedly assert that the direct sale of natural gas by an interstate pipe line company to industrial consumers is interstate commerce. Again we have no quarrel where the nature of the whole of the transaction is

being described." This Court has so characterized such sales.[2]

The question here presented is whether the Mobile privilege tax is levied on an aspect or activity sufficiently apart from the very flow of commerce, and sufficiently localized within the city of Mobile, to lie outside the proscription of the commerce clause.

Stated another way, the question is whether the commerce clause denies a municipality the right to tax an interstate seller for the privilege of completing sales in the city where the seller itself delivers the commodity to the local consumer through seller's permanently maintained facilities in the city, and also services the delivery and collects the purchase price through a local office and local representatives within the city.

## ARGUMENT

### Respondents-Appellees Have Not Faced Up to the Real Question

The appellees-respondents have not faced up to the above question. They apparently ignore the fact that the tax is on a business privilege enjoyed exclusively within the city of Mobile where the sales are made, where the gas is delivered to the consumers, and where a local business office is maintained and the purchase price billed and collected.

We submit that the same error inheres in the decision of the Court of Appeals. In denying the second petition for rehearing that Court summarized its views as follows:

> "We held that delivery of the gas directly to industrial consumers in the City of Mobile is an integral

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[2] *Panhandle Eastern Pipe Line Co. v. Public Service Comm'n*, 332 U.S. 507 (1947).

part of its movement in interstate commerce, and that a tax on the privilege of making such deliveries is a burden on interstate commerce."

Obviously, the Court of Appeals and the appellees-respondents (a) erroneously described the tax as one on the privilege of making interstate deliveries, despite the clear language of the ordinance taxing only the privilege of engaging *within the City of Mobile* "*in the business of selling* or distributing natural gas", and (b) in consequence mistakenly rely on cases where the tax was on the act of interstate transportation or an act directly connected with the interstate flow of commerce[3] and disregard those cases where the tax was, as here, conditioned upon a local activity.[4] Also disregarded is the basic statutory authority upon which the local tax rests. The Alabama statute limits the tax in the case of interstate business to only that portion "within the limits of the state, and where such person, firm or corporation has an office or transacts business in the city or town". Title 37, Section 735, Code of Alabama 1958.

We submit that the Court of Appeals should be reversed and the decision of the District Court reinstated (1) on authority of the decisions of this Court in pipe line cases, and (2) on authority of other decisions of

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[3] *Spector Motor Service, Inc. v. O'Connor*, 340 U.S. 602 (1951); *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157 (1954).

[4] *East Ohio Gas Co. v. Tax Comm'n*, 283 U.S. 465 (1931); *Southern Natural Gas Corp. v. Alabama*, 301 U.S. 148 (1937); *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U.S. 33 (1940); *McGoldrick v. Felt & Tarrant Mfg. Co.*, 309 U.S. 70 (1940); *International Harvester Co. v. Dep't of Treasury*, 322 U.S. 340 (1944); *Field Enterprises, Inc. v. Washington*, 47 Wash. 2d 852, 289 P.2d 1010, aff'd. 352 U.S. 806 (1956); *Norton Co. v. Dep't of Revenue*, 340 U.S. 534 (1951); *Memphis Natural Gas Co. v. Stone*, 335 U.S. 80 (1948).

this Court upholding the right of a state to tax the consummation within its borders of interstate transactions where it treats wholly local transactions the same way. We will briefly summarize these two classes of cases as they relate to the precise question of the taxability of the local event, the consummation of the transaction within the taxing state.

**The Pipe Line Cases**

This Court has announced in clear language that the direct sale to the consumer by an interstate pipe line company is subject to state taxation:

> "This Court has often had occasion to rule that the retail sale of gas at the burner tips by one *who pipes the gas into the state*, or by a local distributor acquiring the gas from another who has similarly brought it into the state, is subject to *state taxation* and regulation. *Public Utilities Comm'n*, 283 U.S. 465; *Southern Gas Corp.* v. *Alabama*, 301 U.S. 148, 154; cf. *Missouri* v. *Kansas Gas Co.* 265 U.S. 298, 309; *Illinois Natural Gas Co.* v. *Central Public Service Co.* 314 U.S. 498." (Emphasis supplied)
>
> Memphis Natural Gas Co. v. Beeler, 315 U.S. 649, 653 (1942).

In *Southern Natural Gas Corp.* v. *Alabama*, 301 U.S. 148 (1937), this court upheld a franchise tax upon a pipe line company for the privilege of doing business in Alabama. The parallel between that case and our case is striking. Southern's business within the state, on which the tax was predicated, consisted of the supplying of gas for consumption to several steel and industrial plants of Tennessee Coal, Iron & Railroad Com-

pany and its affiliates. (Here United supplies seven different industrial plants scattered in the Mobile area.) Southern was required to provide the service lines to the plant sites and metering stations there. (United contracts require the same of it.) A specific reduced delivery pressure was required of Southern. (Similar requirements are imposed on United.) The measuring equipment installed at the plant sites by Southern was to remain its property. (United's contracts contain the same provision.) Southern, although a Delaware corporation, maintained its principal office in Birmingham where the orders were received and serviced and bills rendered. (Although United's principal office is not in Alabama, it maintains a business office in Mobile from which it services these industrial consumers, supervises the deliveries to them, bills for the gas consumed and collects the purchase price. Hence, United also has a business and taxable situs in Mobile.) In upholding the Alabama franchise tax on Southern this Court said:

> "We had occasion in *East Ohio Gas Co.* v. *Tax Commission*, 283 U.S. 465, 470, to consider the distinction between the transportation of gas into a State and the furnishing of the gas so transported to consumers within the State.
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> * * * * * * *
>
> "The Court quoted with approval the statement in *Missouri* v. *Kansas Gas Co.*, 265 U.S. 298, 309, that 'The business of supplying, on demand, local consumers is a local business, even though the gas be brought from another State and drawn for distribution plants directly from interstate mains; and this is so whether the local distribution be

made by the transporting company or by independent distributing companies. In such case the local interest is paramount, and the interference with interstate commerce, if any, indirect and of minor importance.'" 301 U.S. at 154.

The Court below and the appellees-respondents would invalidate this tax on authority of *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157 (1954). That case is readily distinguishable for there the tax was in fact levied on the very flow of commerce. While the tax purported to be levied on the privilege of "gathering gas" this Court pointed out that the activity of the appellants there did not fall "within the meaning of that term and its ordinary usage; but the tax statute gives the term a transcendant scope." 347 U.S. at 161. The incidence of the tax was on the "taking" of the gas into the transmission lines of the pipe line company "after the gas had been produced, gathered and processed by others than appellants. The 'taking' into appellants' pipe lines is solely for interstate transmission and the gas at that time is not only actually committed to but is moving in interstate commerce." *Id.* at 167. The Court further said that "in reality the tax is, therefore, on the exit of the gas from the state." *Ibid.*

It has been repeatedly recognized in cases dealing with regulation that direct sales to industrial consumers constitute sufficient local activity to be subject to state regulation without creating an undue burden on commerce. The appellees-respondents brush aside these cases with the statement that they deal with regulation, not taxation. These decisions are nevertheless very much in point on the precise question of whether the consummation of sales direct to the con-

sumer is a local activity for, if it is, it then becomes subject to state taxation under the controlling decisions of this Court.[3]

As early as *Pennsylvania Gas Co. v. Public Service Comm'n*, 252 U.S. 23 (1920), the Court upheld state regulation of direct sales to consumers because "the thing which the state commission has undertaken to regulate, while part of an interstate transmission, *is local in its nature* * * *." (Emphasis supplied) Likewise, in *U.S. v. Public Utilities Comm'n*, 345 U.S. 295 (1953), dealing with electric power, the Court reaffirmed "that sales across the state line direct to consumers *is a local matter* within the authority of the agency of the importing state." 345 U.S. at 303. (Emphasis supplied)

Again in *Panhandle Eastern Pipe Line Co. v. Michigan Public Service Comm'n*, 341 U.S. 329, 333 (1951), the Court said:

> "but the sale and distribution of gas to local consumers, made by one engaged in interstate commerce is *'essentially local' in aspect* and is subject to state regulation without infringement of the commerce clause of the Federal Constitution." (Emphasis supplied)

That this Court regards an activity that is local for purposes of regulation as being also a *taxable* local activity is evidenced by a footnote to its opinion in the

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[3] Both Scott and Ideal admit that these sales are subject to local regulation. Ideal at page 15 of its motion to dismiss says: "Appellee readily admits that direct sales in interstate commerce of natural gas to industrial consumers is subject to local regulation." They fail to demonstrate either by logic or authority how a local activity for regulatory purposes ceases to be a local activity for tax purposes.

first *Panhandle* case where the following is quoted with approval:

> "... [T]he Supreme Court from the beginning allowed the state both *to tax* and to fix the price on the first sale or delivery of gas or electricity brought in from a sister state when and if this first sale is also necessarily the last sale because consummated by consumption. Powell, Note, 58 Harv. L. Rev. 1072, 1082." (Emphasis added)
>
> *Panhandle Eastern Pipe Line Co. v. Public Service Comm'n*, 332 U.S. 507, 517, n. 12 (1947).

We submit that it is important to set aright the error of the Court of Appeals which, contrary to both the tax and the regulation cases decided by this Court, holds that direct sales to industrial consumers are "inseparable from interstate commerce, and not merely 'a local incident' of such commerce" and again that the sale and delivery of the gas within the City of Mobile "is an integral part of its movement in interstate commerce", and hence may not be locally taxed. (Quoted from opinion of October 5, 1960, on first petition for rehearing, 282 F.2d 574, 580.)

**Other Cases Sustaining Tax on Consummation of a Transaction Within a State**

There is now quite a line of cases dealing with sales of commodities other than gas in which this Court has held that a state may properly tax sales, or the privilege of making sales, or gross income from sales, although made by an out-of-state seller, where the transaction is consummated within the taxing state. A brief look at some of these should be sufficient.

*McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U.S. 33 (1940), involved a sales tax on coal delivered on barges direct to the consumer from out of the state. The tax was held not to violate the commerce clause despite the interstate movement of the coal because the taxable event was "a local activity, delivery of goods within the state upon their purchase for consumption." 309 U.S. at 58.

*International Harvester Co.* v. *Dep't of Treasury*, 322 U.S. 340 (1944), involved a privilege tax upon the receipt of gross income as applied to an out-of-state seller. The Court relied on *Berwind-White* and, while recognizing that in the former case the tax was on the buyer but here it was on the seller, said "but in each a local transaction is made the taxable event and that event is separate and distinct from the transportation or intercourse which is interstate commerce." (322 U.S. at 346) and that "such 'local activities or privileges' * * * are as adequate to support this tax as they would be to support a sales tax." *Id.* at 349.

In *Field Enterprises, Inc.* v. *Washington*, 352 U.S. 806 (1956), this Court affirmed without opinion decisions of Washington state courts (289 P.2d 1010, 1012) holding Field's book sale business to be subject to the state "business and occupation tax" measured by gross receipts. Although orders for books were subject to out-of-state acceptance and were shipped from the out-of-state plant direct to the purchasers, the activities of salesmen and other representatives at a divisional office (where samples were maintained and orders received for forwarding to the out-of-state head office) were held to be sufficient local activities to sustain the occupation tax.

In *Norton Co.* v. *Dep't of Revenue*, 340 U.S. 534 (1951), the Court upheld an Illinois occupation tax

on "the business of selling tangible personal property at retail in this state", measured by gross receipts, as applied to all sales made in Illinois by a Massachusetts corporation except orders that customers sent direct to the Massachusetts office which were filled by direct shipments back to the customers. Held subject to the Illinois tax were (1) sales on orders received or serviced by a local branch office even though the orders were forwarded to Massachusetts for acceptance and shipment from there to the customers, and (2) sales on orders from Illinois residents direct to Massachusetts but shipped to the Chicago branch for delivery by it. All orders forwarded from or in any manner serviced by the Illinois branch office were thus held subject to the tax. Servicing by the Illinois branch was not nearly as extensive as that performed by United from its agency in Mobile. This Court said:

> "Where a corporation chooses to stay at home in all respects except to send abroad advertising or drummers to solicit orders which are sent directly to the home office for acceptance, filling, and delivery back to the buyer, it is obvious that the State of the buyer has no local grip on the seller. *Unless some local incident occurs* sufficient to bring the transaction within its taxing power, the vendor is not taxable."
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> 340 U.S. at 537 (Emphasis supplied).

> "Although the concern does not, by engaging in business within the state, lose its right to do interstate business with tax immunity, *Cooney v. Mountain States Telegraph Co.*, 294 U.S. 384, *it cannot channel business through a local outlet to*

*gain the advantage of a local business and also hold the immunities of an interstate business.*"

*Id.* at 539 (Emphasis supplied).

The Supreme Court of Alabama recently sustained a license tax on an out-of-state contractor for maintenance dredging of a navigation channel in Mobile Bay against the contention that the tax was a direct burden on interstate commerce. The contractor argued that the mechanical phase of the job (dredging) could not realistically be separated from the engineering and administrative phases (which were performed in its New Orleans office) and that the tax was exacted against the total contract price without any apportionment. In a decision that this Court declined to review, the Alabama Supreme Court said:

> "It seems to us that the local activity of performing the contract in Alabama can realistically be separated from the interstate process or flow of commerce (assuming that Standard's overall activities here involved constituted interstate commerce). The tax incidence is the performance of the contract in the State. It is not laid upon any other phase of Standard's activities. It is applicable alike to resident and nonresident contractors. There is no discrimination whatever against nonresidents. The performance of the contract admittedly was wholly within Alabama territory, without any possibility of any other state imposing a tax on such performance. We fail to see any unconstitutional burden or discrimination in the application of the license in this case. *See Western Live Stock v. Bureau of Revenue, supra; McGoldrick v. Berwind-White Coal Mining Co.*, 309

U.S. 33, 60 S.Ct. 388, 84 L.Ed. 565, 128 A.L.R. 876; *Caskey Baking Co. v. Commonwealth of Virginia*, 313 U.S. 117, 61 S.Ct. 881, 85 L.Ed. 1223."

*Standard Dredging Corp. v. Alabama*, 122 So. 2d 280, 286 (Ala. 1960), appeal dismissed, 364 U.S. 309 (1960).

Other state supreme courts have relied on the decisions of this Court discussed above to support local taxation of activities within the taxing state in consummation of interstate transactions. Real confusion in this area of taxation will ensue in both the federal and state courts if the decision of the Court of Appeals here is not reviewed and corrected.[6]

Perhaps the preeminent text in the field of state taxation of interstate commerce is the book on that subject by Paul J. Hartman (Dennis & Co., Inc., 1953). This Court has several times cited Hartman with approval. We submit that his analysis of the right of states to exact a privilege tax measured by gross receipts under the decisions of this Court through the year 1945 has been confirmed by the subsequent decisions. He said:

"Beginning with the epochal *Western Live Stock* [v. *Bureau of Revenue*, 303 U.S. 250 (1938)] de-

[6] The following are illustrative of state court decisions now cast in doubt by the Court of Appeals decision here: *Armstrong v. City of Tampa*, 118 So. 2d 195 (Fla. 1960); *Berkshire Fine Spinning Associates, Inc. v. City of New York*, 5 N.Y.2d 347, 157 N.E.2d 614, appeal dismissed, 361 U.S. 3 (1959); *Keystone Metal Co. v. City of Pittsburgh*, 374 Pa. 323, 97 A.2d 797, cert. denied, 346 U.S. 887 (1953); *Texas Gas Transmission Corp. v. Atkins*, 327 S.W.2d 305 (Tenn. 1959); *Standard Dredging Co. v. Alabama*, 122 So. 2d 280 (Ala. 1960), appeal dismissed, 364 U.S. 309 (1960).

cision, the Court had increasingly emphasized the consequences and effects, either actual or threatened, of the questioned tax to hamper or hinder interstate operations. In answering the constitutional question, the dominant concern of the Court was with whether the tax would place interstate commerce at a competitive disadvantage with local business. Moreover, during the years following *Western Live Stock* the Court had obliterated the pointless and mechanical distinction between a tax levied 'on' gross receipts and taxes imposed on some other subject and 'measured' by gross receipts. The exaction would be sustained if the proceeds taxed, whether from sales transactions or from services, were fairly attributable to activities and events having a substantial connection with the taxing State. That was true whether the subject of the tax was a local privilege measured by gross receipts, or whether the tax was laid directly on gross receipts as the subject of the tax. Whatever the subject of the tax, it would be nullified however, if it threatened to result in a heavier tax burden on interstate than on local business. The emphasis and stress upon formulas and labels were greatly reduced. A pragmatic approach to the problem had been adopted and interstate commerce paid its way."

Hartman, State Taxation of Interstate Commerce, 199 (1953).

**Discrimination in Reverse**

We have emphasized that there is no claim the tax here is discriminatory against interstate commerce, or unfairly apportioned, or unreasonable in amount, or

beyond the charter power of the City of Mobile. The tax applies alike to the local distributor as well as United. The result of the Court of Appeals decision, however, is to discriminate *in favor of* the interstate seller. Just how unfair and unjust this discrimination is, and can become, is demonstrated by the record. Prior to November 1, 1954, nine industries (including the two appellees-respondents) were purchasing their gas from the local distributor, Mobile Gas Service Corporation. All nine of these industrial gas sales contracts were then assigned to United (Ideal R 62; Scott R 57). Seven of these industries were then located in the Mobile taxing jurisdiction (and two in nearby municipalities). Eight of the nine are now within the Mobile tax jurisdiction. However, had they continued to purchase their gas from the Service Corporation, the local distributor, there would be no question of the application of the Mobile tax to such sales.[7] After the assignment of these contracts to United for direct sales to the industries the gas continued to reach each industrial plant through the same mains and pipes, serviced by the same crews, measured through the same meters, and billed and paid for through the same office in the city of Mobile as before. The Service Corporation continued to render every service and function in connection with the sales it had rendered previously. It simply changed from the position of seller to that of agent for United, the new seller. United had removed the "middle man" but retained its services as its agent.

[7] Even the Court of Appeals so recognized in its opinion denying the second petition for rehearing and upholds this very tax as "to the gross receipts of the local distributor, Mobile Gas Service Corporation."

These seven industrial customers under the Court of Appeals decision will enjoy an advantage over other gas users in Mobile, all of whom will become victims of discrimination in reverse. It requires little imagination to picture the evasion of municipal and state privilege taxes that now can be accomplished with the approval of the Court of Appeals. Additional large consumers in the Mobile area might well seek to make this "paper shift" by which their gas requirements would continue to be delivered and serviced by the Service Corporation just as before but in the new capacity of agent for United rather than the direct seller. It should be borne in mind that United is the source of all gas that the Service Corporation distributes in Mobile so even the source would remain the same. In many other municipalities as well, and in states having comparable license or privilege taxes, the local distributor and the interstate pipe line company can offer to the large gas consumer a new and attractive arrangement with substantial tax savings (perhaps with a split among them of the tax saved), but the smaller local consumer whose volume is not attractive to the interstate pipe line will be the victim of a discrimination that we submit is not constitutionally sustainable.*

**Anticipated Summary Enforcement**

The obvious and only purpose of the ordinance before the Court is to raise revenue. The Court of Ap-

* If the decision is sustained this discrimination *in favor of* the interstate seller, and the resulting loss of revenue by the local government under whose protection the business is conducted, will not be limited to sales of natural gas. The same discrimination may arise immediately in interstate sales of electric power to consumers within the area comprising the Fifth Court of Appeals circuit and could well spread to many other interstate sales.

peals anticipates the possible resort to injunctive or criminal procedures to cut off sales in order to compel payment without the slightest suggestion in the case of any threat or intention on the part of local authorities to employ such remedies even if available. A judgment based on anticipated state action is not countenanced by this Court.[9]

Moreover, the validity of the tax is not dependent upon the validity of the feared injunctive or criminal procedures. The ordinance contains a separability clause. The tax liability may be enforced by an action as for a debt. Appropriate protection from any invalid collection procedure, should the city ever resort thereto, is afforded through judicial review. *Public Service Comm.* v. *Wycoff Co.*, 344 U.S. 237, 247-248.

**The Question Merits Review**

The important question of the taxability of direct sales of gas to consumers is presently shadowed with doubt, not only by the decision of the Court of Appeals but by two conflicting state court decisions. Appellees-Respondents frequently cite and quote from *Mississippi Fuel Corp.* v. *Hoffman*, 4 Ill. 2d 468, 123 N.E.2d 503 (Ill. 1954), cert. denied, 349 U.S. 935 (1955). This Illinois decision not only runs contra to the decisions of this court but finds its own indictment in the strong dissenting opinion. Yet it has not been overturned. The Supreme Court of Tennessee subsequently reached the opposite and, we submit, correct result in *Texas Gas Transmission Corp.* v. *Atkins*, 327 S.W.2d 305 (1959). In dealing with "local activities"

[9] *Public Service Comm.* v. *Wycoff Co.*, 344 U.S. 237, 247 (1952); *Utah Power and Light Co.* v. *Pfost*, 286 U.S. 165, 187; *St. Louis S.W.R. Co.* v. *Arkansas*, 235 U.S. 351.

other than sales the Tennessee opinion declares the fact "that Texas is engaged solely in interstate commerce is not determinative" (327 S.W.2d at 307), holds that as to interstate commerce "local incidents may be a sound basis for taxation where they can be sufficiently separated from interstate commerce" (*ibid.*), and found that the Tennessee annual privilege and excise taxes are not direct taxes on interstate commerce, and are not discriminatory and cannot result in multiple taxation.

This Court recognizes the capacity and propriety of state courts deciding federal constitutional questions,[10] and affords uniformity of decision by Supreme Court review.

> ". . . a construction given by any court, whether it be Federal or state, may ultimately be reviewed by this Court . . . and thereby uniformity in construction may be secured."
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> *Great Northern Ry Co. v. Merchants Elevator Co.* 259 U.S. 285, 290-291.

The fact that a conflict between state courts exists on so important a question under the commerce clause, coupled with the conflict the Court of Appeals has here created with decisions of this Court in this important area of taxation, demonstrates that the validity *vel non* of this type of tax is not academic or episodic, that the issue involved is of constitutional dimensions, and that the question presented is one so substantial as to require plenary consideration.

[10] *Pratt v. Paris Gaslight & Coke Co.* 168 U.S. 255 (1897); *New Marshall Engine Co. v. Marshall Engine Co.* 223 U.S. 473 (1912); *State of Arkansas v. Kansas & Texas Coal Co.* 183 U.S. 185 (1901).

## CONCLUSION

The sharp conflict created by the Court of Appeals with decisions of this Court in the area of local taxation of interstate sales consummated within the taxing state, as well as the conflicting decisions of two state Supreme Courts, should be settled and eliminated by this Court. The obvious error of the Court of Appeals in treating a tax on the local business of selling natural gas to the ultimate consumer as if it were a tax on the preceding interstate transportation, in order to condemn it as a tax directly on the flow of commerce, should be remedied. States and municipalities should be permitted to receive just recompense for the protection and benefits afforded the seller who consummates his sales within the local taxing jurisdiction, especially when so many varied local activities are present, as in this case.

We urge that jurisdiction be accepted either by appeal or certiorari.

Respectfully submitted.

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